



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO E322 OF 2019

ZAKHEM INTERNATIONAL

CONSTRUCTION LIMITED.....PLAINTIFF/RESPONDENT

-VERSUS-

KENYA PIPELINE COMPANY.....DEFENDANT/RESPONDENT

KENYA REVENUE AUTHORITY.....INTERESTED PARTY

THE HON ATTORNEY

GENERAL.....INTENDED INTERESTED PARTY/APPLICANT

RULING

1. This Ruling is in respect to the Intended Interested Party's Notice of Motion dated 28th September 2020 brought pursuant to **Order 51 Rule 1** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act, Articles 156(4) & (6)** and **159(2) (d)** of the **Constitution of Kenya, 2010, Section 7** of the **Office of Attorney-General Act** and all other enabling provisions of the law. The Application seeks the following orders:

1. THAT this Honourable Court be pleased to certify this application as urgent and issue a hearing date on Priority.

2. THAT the Attorney General of the Republic of Kenya be enjoined in the suit herein as an Interested party on his own behalf and on behalf of the Ministry of Petroleum and Mining.

3. THAT upon the joinder of the Attorney General as an Interested Party, this Hon. Court be pleased to give directions on the participation of the Attorney General in the proceedings herein.

4. THAT the costs of this Application be provided for.

5. The application is predicated on the grounds on the face of it and supported by the Affidavit of **ANDREW N. KAMAU, CBS**, the Principal Secretary, State Department for Petroleum under the Ministry of Petroleum and Mining. He deposed that the Defendant herein is a State Corporation under the Ministry of Petroleum and Mining, established under the **State Corporations Act, Cap 446** and registered under the **Companies Act, Cap. 486** of the Laws of Kenya.

6. He stated that the suit by the Plaintiff against the Defendant is a claim for USD. 126,255,812.62 for alleged Extension of Time (EOT) Claims plus alleged contractual interest of USD. 2,651,824.07 together with costs of the suit. He noted that the Defendant awarded the Plaintiff the tender which is the subject of the claim herein at the cost of USD. 484,502,886.40 which is equivalent to Kshs.48.5 Billion. He also noted that the court delivered a ruling on 16th June 2020 on an Application dated 20th January 2020 wherein the Plaintiff was awarded a sum of USD. 44,019,024.64 against the Defendant.

7. It was his contention that the Amount of compensation claimed by the Plaintiff and partly awarded by the court involves public monies derived from tax payers' funds and the subject matter of the contract between the Plaintiff and Defendant was for the construction of a public asset. He averred that the issues in the present suit including the claims for compensation read together with the tender cost disclose

variations within the realm of the rule of law and public interest.

8. He argued that the Attorney General has a duty under **Article 156(6)** of the **Constitution** to promote, protect and uphold the rule of law as well as to defend the public interest. Further, he averred that by dint of **Article 156(5)** of the **Constitution** and **Section 7 of the Office of the Attorney General Act**, the Attorney General has a right of audience in proceedings that involve public interest or public money. He asserted that the prayers sought in the suit, if granted, will have a direct bearing on the national government's fiscal policy and development programs. That they risk prejudicing the national government's economic activities, developmental needs and execution of projects.

9. He argued that in the circumstances, the national government has an identifiable stake in the present proceedings hence it is only fair and just that the Attorney General be enjoined in the same on his own behalf and on behalf of the Ministry of Petroleum and Mining so as to protect the public interest.

10. In response, the Plaintiff filed a Replying Affidavit sworn on 26th November, 2020 by **ERMANNIO RABBIOSI**, its Chief Quantity Surveyor and Contract Manager. He deposed that the Application is unmerited, frivolous and amounts to abusive litigation meant to prolong the payment rightfully due to the Respondent herein. That the Application fails to meet the threshold warranting the grant of an order for stay of execution of a lawful decree of a superior court.

11. He confirmed that the tender that subsequently gave rise to the contract which is the subject matter of the suit, that is, Tender Number SU/QT/032N/13 for the construction of Line 1 Replacement Project, was awarded at the cost of USD 484,502,886.40 inclusive of taxes. He stated that the crux of the suit is that the Defendant failed to honour its contractual obligation to pay the agreed sum after the Plaintiff had wholly and satisfactorily performed its end of the contractual bargain and handed over the project to the Defendant. He noted that in fact, on 27th February 2018, the Defendant certified that the Plaintiff had substantially completed the works and the same had satisfactorily passed all tests.

12. He stated that the Defendant's position on the other hand is that the Plaintiff is not entitled to any further payments on account of the project and has denied the Plaintiff's claim *in toto*. He averred that the dispute is purely contractual hence there is no room for any third party intervention as sought by the Intended Interested Party who was not a party to the contract and did not participate in any capacity during the contracting period. He argued that its involvement at this stage will be of no value and was emphatic that the doctrine of privity of contract does not allow for the intrusion of third parties into a dispute arising out of a contract. In his view, the Intended Interest Party is hiding behind the cloak of public interest so as to meddle into a purely contractual dispute.

13. Further, he noted that the Defendant is a State Corporation established under the **State Corporations Act (Cap 446) of 1986** and fully owned by the Government and for all intents and purposes, capable of performing its statutory functions as per **Section 5(1)** of said Act. He averred that any variation on the tender costs as alleged falls within the realm of the contract which this Honourable Court is invited to adjudicate. He argued that there are no issues pertaining to the rule of law as alleged or at all and that the matter is purely a contractual dispute between two corporate entities each with capacity to contract.

14. It was further his contention that the issue of the rule of law is a mere overreach on the part of the Intended Interested Party and the same cannot found a legitimate case for joinder into this dispute. He also noted that the Intended Interested Party, vide letter dated 13th March 2018 opined that the Plaintiff's claim was valid and advised the Defendant to honour and pay its claim of USD 44,019,024.64 in order to avoid further interest and costs.

15. Further, he noted that **Article 156** of the Constitution gives the Intended Interested Party wide powers as the chief government legal adviser but the same does not cascade to situations where a corporate public entity is discharging its corporate mandate. That to do so would mean that the Intended Interested Party co-signs all contracts entered into by public corporate entities. He argued that the Constitution does not envisage the intended Interested Party meddling in the contractual affairs of corporate bodies rather it may give its legal opinion on matters touching on the law and compliance.

16. It was further contended that the national government mandated the Defendant herein and gave it direct authority vide the line Ministry in this case being Ministry of Petroleum and Mining to undertake the subject contract and made available such funds as would be required to undertake the project. As such, it would be absurd for the Intended Interested Party to imply that the national government has just realized the costs of the Contract performed and handed over to the Defendant will adversely affect its fiscal policy. He stated that the argument that the prayers sought will prejudice the national government's economic activities is far-fetched and is a faint attempt at depriving the Plaintiff of its contractual dues under the guise of public interest. He argued that if such were to be the case, the national government through the line ministry would not have approved the project for construction.

17. In totality, he averred that even though the Intended Interested Party has the monopoly of representing the public interest, it has not demonstrated sufficient interest in the case and/or justifiable cause warranting the assignment of the Defendant's contractual obligation to itself on the ground of public interest. Finally, he averred that none of the parties herein will suffer any prejudice if the order sought is not granted and urged that the application be dismissed with costs to the Plaintiff.

Submissions

18. During the hearing of the application, the Applicant was represented by Mr. Leteipan state counsel, the Plaintiff was represented by Mr. Ahmed Nassir Senior Counsel, the Defendant was represented by Ms. Wanjiku advocate whilst Ms. Mburugu advocate represented Kenya Revenue Authority.

19. In his submissions, Mr. Leteipan reiterated the averments in the Application. He was particularly emphatic that the Attorney General's presence before the court is necessary as the principal legal advisor to the government and in view of the colossal tender sum of Kshs. 485 Million. In addition, he stated that since the Defendant is a government corporation established by the Corporations Act, it is required to

obtain budgetary appraisal for any money that is not factored in the budget from the National Treasury. He also noted that since the Plaintiff has made reference to the Attorney General's office at Paragraphs 31 and 32 of the Plaint, it is in the interest of justice that the Attorney General be granted an opportunity to ventilate the issue raised therein to give some clarity. He relied on the case of **Pevans East Africa Ltd v Kenya Revenue Authority [2019] eKLR** where Kasango J allowed an application for joinder of the Attorney General on the ground of public interest.

20. On the other hand, Mr. Ahmed Nassir Senior Counsel noted that Mr. Leteipan is oblivious of the history of the matter. He submitted that there is no law that requires the Attorney General to look after the public interest or oversee public funds. Counsel gave a brief history of the matter and contended that if the Attorney General is enjoined in the proceedings, it will look like four government departments are Defendants in the matter which is not the case. He noted that the Attorney General does not want to join the proceedings so that it can help the court to effectively adjudicate the dispute. Rather, the Intended Interested Party seems to be scaring and warning the court of the judgment that the court may eventually give.

21. Mr. Ahmed Nassir submitted that in any event, no empirical evidence has been given regarding the programs that will be affected if the judgment sought in the Plaint is granted or if the orders in the application are not allowed. He urged the court not to be moved by the Applicant merely because the Defendant lost in the case. He relied on the case of **Attorney General V Kenya Bureau of Standards & Another [2018] eKLR**, where the Court of Appeal dismissed a similar application and held that the Attorney General must show what value he will add to the matter. In the premises, he urged that the application be dismissed with costs.

22. Both Ms. Wanjiku and Ms. Mburugu were not opposed to the joinder of the Attorney General as an interested party in the suit.

Analysis and Determination

23. I have considered the Application by the Attorney General, the Plaintiff's response thereto, the submissions by counsel for the parties as well as the authorities relied on. The only issue for determination is whether the Attorney General should be enjoined to this suit as an Interested Party.

24. The **Black's Law Dictionary, 9th Edition** at page 1232 defines an interested party as;

"A party who has a recognizable stake (and therefore standing) in the matter"

25. There is no doubt that the Attorney General as an institution plays an important role in legal matters involving the Government of Kenya. In this regard, **Article 156 (5)** of the **Constitution** authorizes the Attorney General to appear with leave of the court, as a friend of the court in any civil proceedings to which the government is not a party. Further, **Article 156(6)** of the **Constitution** obligates the Attorney General to promote, protect and uphold the rule of law and defend the public interest.

26. In addition, under **Section 7 (1)** of the **Office of the Attorney General Act, 2012**, the Attorney General has the right of audience in proceedings of any suit or inquiry of an administrative body which the Attorney General consider to be of public interest or involving public property; or involving the legislature, the judiciary or an independent department or agency of the Government. Notably however, **Section 7 (2) (b)** of the Act demands that the Attorney General must satisfy the court, tribunal or any other administrative body of the public interest or public property involved. The said **Section 7** specifically provide as follows:

"7. Audience by Attorney-General in matters of public interest, etc.

(1) Despite the provisions of any written law to the contrary or in the absence of any other written law, the Attorney-General shall have the right of audience in proceedings of any suit or inquiry of an administrative body which the Attorney-General considers—

(a) to be of public interest or involves public property; or

(b) to involve the legislature, the judiciary or an independent department or agency of the Government.

(2) In the exercise of the powers of the Attorney-General under subsection (1), the Attorney-General shall—

(a) notify any court, tribunal or any other administrative body of the intention to be enjoined to the suit, inquiry or administrative proceedings; and

(b) satisfy the court, tribunal or any other administrative body of the public interest or public property involved.

and comply with any direction of the court, tribunal or any such other administrative body on the nature of pleadings or measures to be taken for purposes of giving effect to the effective discharge of the duties of the Office.

(3) Where a suit, inquiry or any other proceedings is pending before a court, tribunal or any other administrative body to which the Attorney-General does not have a right of audience, it shall be sufficient for the Attorney-General to file a certificate of the intention of the Attorney-General to be joined in the proceeding.

(4) The court, tribunal or any such administrative body shall, upon receipt of a certificate under subsection (3), enjoin the Attorney-General in the proceedings."

27. The big question at this point therefore is whether the Attorney General has satisfied this court that there is public interest or public property involved in the instant suit that warrants his being enjoined in the suit. On this, I find useful guidance in **Attorney General v Kenya Bureau of Standards & Another [supra]** where the Court of Appeal while considering whether the Attorney General should be enjoined to the appeal noted as follows:

“... the circumstances must justify the joinder... Again, it must be demonstrated that it would be desirable to add the applicant as a new party and that his presence would enable court to resolve all the matters in the dispute. Another important consideration is whether the joinder is intended to vex the parties or convolute the proceedings with unnecessary new matters and grounds not contemplated by the parties or envisaged in the pleadings. It cannot therefore fall from the lips of the applicant to say that it would protect and promote public interest in this dispute. The issue of interest or liability between the parties can be sufficiently and conclusively determined without any [reference] to the applicant.”

28. The Court in the said case went on to state that:

“Whereas it is not in doubt that an award of US \$ 15,401,504.70, (less Kshs. 87,988,213.15) is, by any standard colossal, that alone cannot be the reason for joining the applicant in these proceedings this late. He has not convinced us that what he intends to advance will be helpful to the Court in the resolution of the main question in hand. As a matter of fact, and with respect, we do not think what the applicant wishes to bring into these proceedings is any different from those of the other parties already on record. He, similarly, has not demonstrated what prejudice he or indeed the country stands to suffer if his intervention is denied.”

29. Similarly, in the instant case, the mere fact that the suit arose from a tender which was awarded at a colossal sum of Kshs. 485 Million does not warrant the joining of the Attorney General in the suit. I am also not convinced that the mere fact that the proposed Interested Party has been mentioned in the Plaint calls for his involvement in this case. Indeed, he has not stated what sort of clarity will be brought about by his involvement and/or how that will assist the court in effectively determining the main issues in dispute in the present suit. Further, I am in agreement with the Plaintiff’s submission that the intended Interested Party has not demonstrated how the purported development programs will be prejudiced if the present application is disallowed. In the premises, I am not convinced that the Attorney General’s involvement in this suit as an Interested Party is necessary.

30. Accordingly, I find that the Notice of Motion dated 28th September 2020 lacks merit and is hereby dismissed. However, I make no orders as to costs. It is so ordered.

DATED AND DELIVERED THIS 17TH DAY OF JUNE, 2021.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Leteipan for the Applicant.*
2. *No appearance for the Plaintiff/Respondent*
3. *No appearance for the Defendant/Respondent.*
4. No appearance for KRA/Interested Party.